FILE COPY

FILED
NOV 10 1960
JAMES R. BROWNING, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1960

No. 532

EDDIE R. DICKSON, Warden, California State Prison at San Quentin, California,

Petitioner,

vs.

MANUEL JOE CHAVEZ,

Respondent.

EDDIE R. DICKSON, Warden, California State Prison at San Quentin, California,

Petitioner,

vs.

CLYDE BATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

STANLEY MOSK,
Attorney General of the State of California,

ARLO E. SMITH,
Deputy Attorney General of the State of California,
350 State Building, San Francisco 2, California,

Attorneys for Petitioner.

Subject Index

	Page
Opinions below	2
Jurisdiction	2
Questions presented	3
Statutes involved	3
Statement	3
Argument	6
I.	
Reasons for granting the writ	6
II.	
Importance of the questions	7
III.	
The decision of the Court of Appeals is erroneous	8
A. The decision of the Court of Appeals for the Ninth Circuit is in conflict with other decisions of the Court of Appeals for the Ninth Circuit and in conflict with decisions of this court	8
B. This court erroneously required a redetermination of a factual question previously determined by the State Trial Court as a "preliminary question of fact"	12
C. The opinion of the Court of Appeals makes the presence of a "prejudicial error" the equivalent of a "denial of due process"; if the test applied in this case is followed, the State appellate procedures would best be by-passed and State convictions reviewed by the District Courts	13
Conclusion	16

Table of Authorities Cited

Cases

	Pages
Bates v. California, 359 U.S. 993	4
Brown v. Allen, 344 U.S. 443	4, 6, 7, 9, 13
Chavez v. California, 358 U.S. 946	4
Linden v. Dickson, 278 F.2d 755 (1960)	6, 9, 10, 12
Muhlenbroich v. Heinze, 281 F.2d 881 (1960)	6, 9
People v. Chavez, 50 Cal.2d 778	4

Codes

California Penal Code, Section 448a	4
28 U.S.C. 1254(1)	2
28 U.S.C. 2241	3
28 U.S.C. 2254	3

Constitutions

California Constitution, Article IV, Section 4½	15

Rules

Rules on Appeal, Rule 23(5)	2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1960

No.

FRED R. DICKSON, Warden, California State Prison at San Quentin, California,
Petitioner,
vs.
MANUEL JOE CHAVEZ,
Respondent.

FRED R. DICKSON, Warden, California State Prison at San Quentin, California,
Petitioner,
vs.
CLYDE BATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

Fred R. Dickson, Warden of the California State Prison at San Quentin, prays that a writ of certiorari

issue to review the judgments of the United States Court of Appeals for the Ninth Circuit in the above entitled actions of June 16, 1960, which reversed the orders of the United States District Court.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Ninth Circuit, printed in Appendix A, is reported at 280 F.2d 727 (1960).

The opinion of the California Supreme Court, which affirmed the judgment under attack in these proceedings is reported at 50 Cal.2d 778.

JURISDICTION.

The orders of the United States District Court denying the petition for writ of habeas corpus was entered on August 7, 1959; Appendix D.

The judgments of the Court of Appeals for the Ninth Circuit reversing the District Court's order was entered on June 16, 1960; Appendix B. After due consideration, the U. S. Court of Appeals denied a rehearing on August 17, 1960; Appendix C. A stay of mandate has been granted pending determination of this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Pursuant to rule 23(5) a single petition for writ of certiorari is being filed to cover both cases.

QUESTIONS PRESENTED.

1. May the District Court, in the absence of a "vital flaw" in the state proceedings, be compelled to redetermine a factual question previously determined by the trial court?

2. What discretion, if any, does the District Court have in refusing to take evidence to redetermine a fact previously determined by the State Court?

3. Would the District Court have jurisdiction to hold a hearing and issue the writ of habeas corpus?

a. Did the failure of the petitioners to present available evidence of the alleged discrepancies in the transcriptions to the trial court preclude them from raising the question on federal habeas corpus?

b. Does this failure result in a waiver of the question? Does this result in petitioners having failed to exhaust their state remedies within the meaning of 28 U.S.C. 2254?

4. Is "prejudicial error" the equivalent of "denial of due process"?

STATUTES INVOLVED.

28 U.S.C. 2241 and 28 U.S.C. 2254; Appendix E.

STATEMENT.

Petitioners Bates and Chavez, along with one Manuel Hernandez, were jointly tried, charged and convicted of six counts of murder in the first degree

and punishment for Bates and Chavez was fixed at death. Hernandez was sentenced to life imprisonment. Likewise, the three defendants were charged, tried and convicted of arson, a violation of § 448a of the California Penal Code. In brief, the defendants were accused of having participated in an argument and fight in the Mecca Bar and threatened to get even. They left the bar, obtained gasoline, threw the gasoline through the front door of the bar and ignited it. As a result, five persons were killed by carbon monoxide and the sixth death was caused by asphyxiation and burns.

The appeals of Bates and Chavez were automatically before the California Supreme Court under California practice. A separate notice of appeal was filed by Hernandez and the California Supreme Court disposed of all three cases in *People v. Chavez*, 50 Cal.2d 778. The United States Supreme Court denied the petition for writ of certiorari. *Chavez v. California*, 358 U.S. 946; *Bates v. California*, 359 U.S. 993.

On August 3, 1959, respondent filed a petition for writ of habeas corpus in the U.S. District Court; the District Court issued an order to show cause on August 5, 1959, returnable August 7, 1959. Petitioner filed a return to the order to show cause, together with points and authorities, on August 7, 1959. At the time of the hearing on the order to show cause petitioner pursuant to the case of *Brown v. Allen*, 344 U.S. 443, lodged with the District Court a copy of the Clerk's Transcript and Reporter's Transcript of the murder trial of Bates and Chavez.

On August 7, 1959, the U. S. District Court entered an order denying the petition for writ of habeas corpus. On that same date a notice of appeal was filed and the District Court issued a certificate of probable cause.

On June 16, 1960, the U. S. Court of Appeals reversed the order of the District Court and on August 17, 1960, the Court of Appeals denied a petition for rehearing.

The opinion of the Court of Appeals ordered the District Court to hold a further hearing and "at such further hearing the tape recordings should be called for and listened to, and the trial court proceedings relative to the use of the transcribed statements should also be examined."

The Court further ordered the examination of photographs admitted in the State trial court. The language of the opinion in this regard was as follows: "Since this cause is to be remanded for further proceedings in connection with the asserted inaccuracy of the transcribed statements, we think the district court should at the same time examine the photographs taken away from the premises as an aid in redetermining whether their introduction has deprived appellants of due process."

ARGUMENT.

I.

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals for the Ninth Circuit is in conflict with other decisions of the Court of Appeals for the Ninth Circuit and in conflict with decisions of this Court.

The present decision is in conflict with the decision in *Linden v. Dickson*, 278 F.2d 755 (1960) and the decision in the Ninth Circuit in the case of *Muhlenbroich v. Heinze*, 281 F.2d 881 (1960). The present decision is not in accord with the decision in *Brown v. Allen*, 344 U.S. 443.

The opinion of the Court of Appeals for the Ninth Circuit is in conflict with the long standing views of this Court as expressed in *Brown v. Allen*, 344 U.S. 443 on the question of "waiver" and "exhaustion of state remedies." The Court of Appeals requires the District Court to second guess the trial court as to the accuracy of said transcriptions and requires this second guess to be made on evidence which was not produced in the trial court. According to the allegations of the petition, petitioners were presumably aware of said evidence at the time of the trial and their failure to present such evidence at that time to offset the testimony of the prosecution resulted in a waiver of any objection, unless the decision in *Brown v. Allen*, supra, at 486, 503 is modified.

The opinion of the Court of Appeals for the Ninth Circuit equates "prejudicial error" with "denial of

due process." The opinion of the Court of Appeals has merged the concept of the denial of due process and the concept of prejudicial or reversible error. The opinion of the Court of Appeals has either knowingly or inadvertently equated these concepts. The opinion of the Court of Appeals, after setting forth the standards, has stated "if the transcriptions were grossly inaccurate to the *substantial prejudice* of the appellants there would . . . in our opinion be a denial . . . of due process."

The Court of Appeals likewise stated that a material variance between the intelligible portions of the records and the transcribed statements which *substantially prejudiced* the appellants would require federal relief.

This equation of due process and prejudicial error is contrary to and in conflict with the numerous prior decisions of this Court.

II.

IMPORTANCE OF THE QUESTIONS.

The questions here presented are of importance in the administration of federal habeas corpus statutes. Since the opinion in *Brown v. Allen*, in 1952, this Court has not rendered a full opinion on the question of the powers, duties and discretion of the District Court in reference to the taking of evidence on a factual question which is the basis of a federal question. The recent decisions of this Court have been

per curiam decisions and have been no real guidance to the District Courts or to counsel in disposing of the some 800 petitions for writs of habeas corpus filed in the District Courts each year. There are no standards provided for the District Court in the determination of these questions in death penalty cases which are as frequently as not presented on the eve of a scheduled execution. The conflict between the decisions in the Court of Appeals for the Ninth Circuit itself leaves the various District Courts of the Circuit in confusion. This problem should be authoritatively determined by this Court and not left in conflict and doubt.

Likewise, the questions concerning waiver and exhaustion of state remedies are questions which occur in nearly every petition for writ of habeas corpus presented to the District Court and are questions upon which this Court should rule definitively.

The importance of the question of the standard to be used in determining "due process" would seem to need little comment.

III.

THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS.

A. The Decision of the Court of Appeals for the Ninth Circuit Is in Conflict With Other Decisions of the Court of Appeals for the Ninth Circuit and in Conflict With Decisions of this Court.

The present opinion of the Court of Appeals for the Ninth Circuit requires the District Court to examine the transcript of the state court proceedings in order

to determine whether or not the alleged discrepancy between the recording and the transcription of the statements introduced resulted in substantial prejudice to petitioners.

The present decision is in conflict with the decision in *Linden v. Dickson*, 278 F.2d 755 and the decision in the Ninth Circuit in the case of *Muhlenbroich v. Heinze*, 281 F.2d 881 (1960). The present decision is not in accord with the decision in *Brown v. Allen*, 344 U.S. 443. The *Linden* case authorizes the District Court to rely upon the decision of the highest state court as a part of the state record. That ruling should apply with equal force in the present case.

The *Linden* case involved an allegation that defendant had become insane at the time of the trial and that while so mentally incapacitated he had discharged his attorney and attempted to defend himself. This matter was discussed in the decision of the California Supreme Court. The prisoner in that case thus simply took issue with the conclusion of the trial court and the California Supreme Court as to the interpretation of his conduct. In the present case the prisoner contended that there was a discrepancy between the statements of Hernandez and Brenhaug as recorded and the statements as transcribed and introduced in evidence. The prisoners also contend that gruesome photographs were introduced which resulted in violation of due process.

The decision of the Court of Appeals for the Ninth Circuit requires the District Court to review those photographs and to take evidence as to alleged dis-

crepancy between the statements as recorded and as transcribed. It is clear that the District Court will be making a judgment as to the inflammatory nature of the photographs and as to the prejudicial effect of this on the trial, in the same fashion as this was done by the trial court and the California Supreme Court. There is no greater discrepancy between the matters set out in the opinion of the California Supreme Court and the allegations of petitioners than existed in the *Linden* case; both involve the drawing of legal conclusions from the "record."

Likewise, the alleged discrepancy between the statements as transcribed and as recorded does not present a question the resolution of which requires a different judicial technique than that presented by the allegations in the *Linden* case. Both situations involve an evaluation and ruling by the trial court based on the facts before it; in one instance an evaluation as to the defendant's sanity and in the other instance a determination of a "preliminary question of fact" prior to ruling on evidence. Indeed, it is apparent from the briefs, of which the Court of Appeals took judicial notice, that the *only* evidence presented before the trial judge concerning the accuracy of the transcriptions was that the transcriptions were true and correct copies of the recordings. See RT 1411-1412, 1427, 1431-1432, 1464-1466, 1470; Opening Br. of Chavez, pp. 27, 28; Opening Br. of Bates, pp. 16, 20-21; Resp. Br. pp. 64, 65, 67.

Furthermore, the opinion of the Court of Appeals totally ignores the argument set out at length by the

California Supreme Court concerning the possible effect of these statements on either Bates or Chavez. It should be noted that neither of these statements were admitted as to Chavez. The California Supreme Court properly assumed that the jury followed the instructions and did not consider these statements as against Chavez. Even assuming that the statements as introduced were seriously and "prejudicially" different than the statements as recorded, this fact would appear to be immaterial to Chavez' position. It would appear that no prejudice resulted to him in view of the instruction to the jury not to consider the statements. Put another way, if one assumes (as an appellate court must under the long-established rule of common law jurisdiction) that the jury followed the instruction and disregarded the statements as to Chavez, any error in the transcription would not result in prejudice.

Likewise, the statement of Hernandez was not admitted as to the defendant Bates. Such statement was introduced with instructions that the jury disregard it as to Bates. The California Supreme Court nevertheless assumed that the jury followed the instructions as to Bates. Thus, it is apparent that any discrepancy in these statements would be immaterial and would present no federal question. The statement of Brenhaug was admitted as to Bates. Such statement was introduced under proper instructions to the jury. The opinion of the Court of Appeals recognizes the fact that the only evidence was the police officer's testimony. The officer testified that the transcriptions were

true and correct. This fact was, and is, not contradicted by petitioners. Thus, the petition as filed below fails to state a federal question. It is clear that the District Court could properly look at the documents before the Court, together with the opinion of the California Supreme Court, and arrive at the same conclusion as the California Supreme Court.

The District Court could conclude that the jury followed the instructions and that the trial court correctly overruled the objection concerning the alleged inaccuracy in the transcriptions of the recorded statements, since the only evidence before the trial court was that the transcribed statements were true and accurate transcriptions. See RT 1411-1412, 1431-1432, 1464-1466.

We thus request this Court to grant a writ of certiorari because of the conflict that exists between this opinion and the opinion in *Linden v. Dickson*, which decision was neither discussed, distinguished or even cited in the present decision.

B. This Court Erroneously Required a Redetermination of a Factual Question Previously Determined by the State Trial Court as a "Preliminary Question of Fact".

The opinion of the Court of Appeals requires the District Court to redetermine a question of fact which has previously been determined by the state trial court. Whether or not the transcription of the statement as introduced was a substantially true and correct transcription of the record is a preliminary question of fact to be determined by the trial court prior to the introduction of such evidence. In the present case,

the trial court received evidence that the statements were substantially true and correct copies of the recordings. See RT 1411-1412, 1431-1432, 1464-1466. This was the only testimony received by the trial court. Defendants did not offer any counter-evidence. The prisoners' attorneys made general objections to the foundation and objected that the statements were not true and correct copies, but they made no specifications of the alleged discrepancies and offered no evidence to support the statements. They have not yet done so. In view of the evidence before the trial court at the time of its ruling on this preliminary question of fact, the ruling of the trial court was eminently proper.

The Court of Appeals now requires the District Court to second guess the trial court as to the accuracy of said transcriptions. It requires that this second guess be made on evidence which was not produced in the trial court. Indeed, by failure to present such evidence to the trial court to offset the testimony of Officer Tidyman the defendants have *waived any objection*. This is patent from a reading of the briefs, of which the Court of Appeals has taken judicial notice. See Resp. Br. pp. 64, 65, 67. See *Brown v. Allen*, 344 U.S. 443, 486, 503.

C. The Opinion of the Court of Appeals Makes the Presence of a "Prejudicial Error" the Equivalent of a "Denial of Due Process"; If the Test Applied in This Case Is Followed, the State Appellate Procedures Would Best Be By-Passed and State Convictions Reviewed by the District Courts.

The opinion of the Court of Appeals has in effect merged the concept of the denial of due process and the

concept of prejudicial or reversible error. Petitioner does not argue with the wording of the standard of due process set out in the opinion of the Court of Appeals insofar as it quotes and utilizes language of the U. S. Supreme Court to the effect that denial of due process exists where there has been a denial of "fundamental fairness essential to the concept of justice." However, the opinion of this Court has either knowingly or inadvertently equated the concepts of due process and the concept of reversible or prejudicial error. The opinion of the Court of Appeals, after setting forth the standards, has stated that "if the transcriptions were grossly inaccurate to the *substantial prejudice* of the appellants there would . . . in our opinion be a denial . . . of due process."

The Court of Appeals likewise stated that a material variance between the intelligible portions of the records and the transcribed statements which *substantially prejudiced* the appellants would require federal relief. It is clear from this language, irrespective of other language in the opinion, that the Court of Appeals is substituting the standard of "reversible error" for the standard of due process. Indeed, the wording of the opinion is in the classical language of the reversible error rule currently followed by all common law jurisdictions, including California. The California Constitution contains a provision which is a typical statement of the reversible error rule. It requires that "no judgment shall be set aside for the improper admission or rejection of evidence . . . unless after an examination of the entire cause, it

cluding the evidence, the Court shall be of the opinion that the error complained of has resulted in a miscarriage of justice" (Art. IV, § 4½, Calif. Constitution).

If the District Court is permitted to set aside judgments where evidence has been introduced to the "substantial prejudice" of the appellants, then every ruling on procedure, every question concerning the conduct of the trial by the judge or the prosecution, is a question which can be reviewed by the District Court. If the test is whether or not "substantial prejudice" resulted to the defendants, then these matters may be reviewed by the District Court, irrespective of whether or not the highest state court has determined on appeal that the ruling was not prejudicial. Indeed, the opinion of the Court of Appeals permits the District Court to second guess the highest state court on the question of prejudice. Under the test as set out in this case, it would seem most expeditious and most sensible to by-pass the state appellate courts and to permit direct review by the United States District Court of all rulings on evidence, procedure and the conduct of the trial.

It should further be pointed out that the opinion of the Court of Appeals suggests that the District Court may examine the photographs and determine the prejudicial effect without examining the entire transcript. The Court of Appeals suggests that the District Court may find it advisable to consult any *specific part* of the trial proceedings as having a bearing on the question of prejudice in the introduction of

said photographs. The California Constitution requires that a state appellate court decide a question of prejudice only after "an examination of the *entire cause*, including the evidence." We believe that this Court has merged the doctrines of prejudicial error and the concept of due process and indeed, would permit an evaluation of prejudice in such a fashion as to deny both sides due process. It would permit the District Court to decide the question of prejudice without examining the entire cause, including the evidence. This would be "grossly unfair" in a constitutional sense. Both parties are entitled to an evaluation of the prejudicial effect of anything occurring at the trial to be judged in the context of the entire cause, including the evidence.

CONCLUSION.

It is respectfully requested that this petition be granted.

Dated, San Francisco, California,
November 9, 1960.

Respectfully submitted,

STANLEY MOSK,
Attorney General of the State of California.

ARLO E. SMITH,
Deputy Attorney General of the State of California.

Attorneys for Petitioner.

(Appendices A, B, C, D and E Follow.)